94-106

CROWELL & MORING
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2595
(202) 624-2500
CABLE: CROMOR
FACSIMILE (RAPICOM): 202-628-5116
W. U. I. (INTERNATIONAL) 64344
W. U. (DOMESTIC) 89-2448

JOHN T. SCOTT III
(202) 624-2582

September 19, 1994

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street N.W. Room 222
Washington, D.C. 20554

Re: PR File No. 94-SP4

Dear Mr. Caton:

Transmitted herewith for filing with the Commission in the above-referenced proceeding are an original and four copies of the "Opposition of the Bell Atlantic Metro Mobile Companies" to the Petition of the Connecticut Department of Public Utility Control.

Should there be any questions regarding this matter, please contact the undersigned.

Very truly yours,

John T. Scott, III

John T. Scott, III

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Connecticut Department of	)	
Public Utility Control to Retain Regulatory	)	PR File No. 94-SP4
Control of the Rates of Wholesale Cellular	)	
Providers in the State of Connecticut	)	

OPPOSITION OF THE BELL ATLANTIC METRO MOBILE COMPANIES

John T. Scott, III
Charon J. Harris
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20554
(202) 624-2500

Their Attorneys

September 19, 1994

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Connecticut Department of	)	PR File No. 94-SP4
Public Utility Control to Retain Regulatory	)	
Control of the Rates of Wholesale Cellular	)	
Service Providers in the State of Connecticut	)	

OPPOSITION OF THE BELL ATLANTIC METRO MOBILE COMPANIES

The Bell Atlantic Metro Mobile Companies ("Bell Atlantic"),[1] by their attorneys and pursuant to Section 20.13(c)(2) of the Commission's Rules, hereby oppose the "Petition to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut" ("Petition") filed by the Connecticut Department of Public Utility Control ("DPUC").

I. SUMMARY

This proceeding concerns the DPUC's request to continue its current rate regulation of cellular carriers. The DPUC's scheme regulates wholesale -- but not

[1] The Bell Atlantic Metro Mobile Companies operate cellular telephone systems in five Connecticut markets. The names of the companies and markets are: Metro Mobile CTS of Hartford, Inc. (Hartford MSA), Metro Mobile CTS of New Haven, Inc. (New Haven MSA), Metro Mobile CTS of New London, Inc. (New London MSA), Metro Mobile CTS of Bridgeport, Inc. (Bridgeport) and Metro Mobile CTS of Windham, Inc. (CT-2 RSA).

retail -- rates, and applies to cellular carriers -- but not to other types of commercial mobile service providers.

At issue is whether the DPUC has met its statutory burden to show that this regulatory scheme protects subscribers. It has not. The Commission should deny the Petition because it does not meet the strict requirements Congress imposed on states which seek to depart from Congress's mandate to eliminate unnecessary CMRS regulation.[2]

First, the regulatory regime at issue here is flatly violative of Congress's mandate that CMRS regulation be consistent and even-handed. Connecticut regulates only cellular, but not competitive CMRS services including SMR and PCS. The DPUC does not justify this disparity. It is a fatal defect.

Second, the DPUC has failed to present evidence that the market conditions for commercial mobile radio services in Connecticut do not protect subscribers from rates that are unjust or unreasonable, and that the DPUC's regulatory scheme is necessary to provide such protection. Indeed it presents no evidence on retail rates and market conditions at all. The DPUC does not show any nexus

---

[2] During May and June 1994, the Connecticut DPUC conducted an "Investigation into the Connecticut Cellular Service Market and the Status of Competition," Docket No. 94-03-27. On August 8, 1994, the DPUC issued two documents: (1) a 33-page "Decision" reporting its findings and conclusions, and (2) a 5-page "Petition" to the FCC to retain wholesale rate regulation pursuant to Section 332(c)(3)(B) of the Communications Act. The Petition makes no independent findings, but purports to be based on the Decision. Its express purpose was to place the Decision in the procedurally proper format to seek Section 332 authority. Thus the FCC should apply Section 332, and its implementing Rules, to the Decision rather than the Petition. (In fact, as discussed later at Part V of this Opposition, the Petition mischaracterizes both the Decision and the record.)

between competitive conditions at the wholesale level and rates charged end users, nor any nexus between its wholesale rate regulation and protection of end users. Since each of these showings must be made before a Section 332 petition can even be considered, the Petition is deficient on its face and must be denied.

Third, even were the Commission to consider the record developed by the DPUC, that record does not support grant of the Petition. The DPUC concedes that, on the basic issue of cellular rates, the evidence was "inconclusive." That finding in and of itself prevents the Petition from meeting the statutory test. In fact, wholesale service in Connecticut has been characterized by high growth, significant network investment, expanding service coverage, declining prices, and intense competition between the A-side and B-side carriers for market share; and the record showed this.

The Decision makes clear that the DPUC wants to regulate because there is a duopoly, and to keep regulation in place until SMR, PCS and other CMRS carriers take market share away from the existing carriers. But this is not the statutory test for permitting a state to maintain regulation. In effect, the DPUC wants to continue regulation to give it more time to make the necessary statutory showings. That, again, is not what Congress allowed.

The DPUC spends most of its Decision on a factually erroneous review of business relationships among cellular carriers, their retail affiliates and independent resellers. Those relationships are, however, irrelevant to a Section

332 petition. The specific wholesale pricing practices that the DPUC complains about most are practices that the DPUC has itself approved for years.

In the end there is nothing in the Petition which supplies any basis to grant it. Connecticut's scheme is precisely the sort of unnecessary regulation that Congress wanted preempted, and the Commission should do so forthwith.

II. CONGRESS CREATED A STRONG PRESUMPTION AGAINST STATE RATE REGULATION.

The Omnibus Budget Reconciliation Act of 1993 ("Budget Act" or "Act") creates a presumption in favor of preemption of state and local rate regulation of CMRS and forecloses without exception state and local regulation of CMRS entry standards. See Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, Title VI, § 6002(b)(2)(A), 107 Stat. 393 (1993) (codified at 47 U.S.C. § 332(c)(3)). Congress decided to preclude state regulation of CMRS rates and entry as a part of its broader effort in the Budget Act to create regulatory parity for all mobile services. See 47 U.S.C. § 332(c)(1). Congress decided that state preemption would promote regulatory parity and "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. Rep. No. 103-111, 103d Cong., 1st. Sess. 260 (1993). Congress found that a dual regulatory regime would inhibit the development of CMRS and that it was therefore preferable to let competition in the marketplace rather than burdensome regulation set CMRS rates.

The Budget Act allows the states to overcome the presumption against state regulation of CMRS rates, but not entry, under a very narrow set of circumstances. The Act permits a state to initiate or continue rate regulation if it establishes through a petition to the Commission that market conditions for CMRS are not sufficient to "protect CMRS subscribers adequately from unjust and unreasonable rates or rates that are unjustly and unreasonably discriminatory."[3] 47 U.S.C. § 332(c)(3)(B). In implementing Section 332, the Commission correctly recognized that "States must, consistent with the statute, clear 'substantial hurdles' if they seek to continue or initiate rate regulation of CMRS providers." Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd. 1411, 1421 (1994) ("Second Report and Order"). A state may regulate rates only if it can meet these requirements. A state must (1) come forward with specific, "demonstrative evidence" of the CMRS market conditions in the state, (2) show how those market conditions do not protect end users from unjust and unreasonable rates, and (3) show that its regulations provide that protection. Section 20.13(a)(1). The state also bears the burden of proof as to all three elements. Section 20.13(a)(4).

---

[3] In the alternative, a state may seek to justify rate regulation if such market conditions exist and CMRS is a replacement for land line telephone exchange service for a "substantial portion" of the telephone land line exchange service within the state. Id. The DPUC expressly found that this situation did not exist: "The evidentiary record of this proceeding does not support a finding that CMRS is a replacement for landline telephone exchange service for a substantial portion of the telephone landline exchange service within Connecticut." Decision at 30.

III. THE DPUC'S SCHEME OF CELLULAR-ONLY REGULATION VIOLATES PARITY.

The DPUC regulates only one type of service, cellular. It does not regulate other competing mobile services, including one-way and two-way paging, Improved Mobile Telephone Services, Rural Radio Services, or Specialized Mobile Services. Nor does it reach new CMRS services which are poised to take market share away from cellular carriers, enhanced SMR and PCS. This creates a sharp disparity between extensive regulation of cellular -- and no regulation of other wireless services.

One of the cardinal goals of Congress in rewriting Section 332 was to achieve regulatory symmetry among all services classified as CMRS. To that end, the Conference Committee directed the FCC, in considering a state petition, to "ensure that such regulation is consistent with the overall intent of this subsection as implemented by the Commission, so that, consistent with the public interest, similar services are accorded similar regulatory treatment." H. Conf. Rep. No. 103-213 at 494 (emphasis added).[4]

[4] The Commission has repeatedly held that consistent regulation is essential to implementing Section 332: "[A]n even-handed regulatory scheme under Section 332 would promote competition by refocusing competitors' efforts away from strategies in the regulatory arena and toward technological innovation, service quality, competitive pricing, and responsiveness to consumer needs." Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54 (FCC 94-145), at ¶ 2. Allowing the DPUC's scheme to remain in place would undermine that critical principle.

The DPUC's Petition neither acknowledges Congress' directive, nor explains why disparate regulation of different CMRS services is warranted. It simply ignores this critical issue. The state's scheme is precisely the sort of uneven regulatory structure that Congress wanted preempted. Because the DPUC fails to justify is flatly asymmetrical regulatory scheme, that scheme must be preempted.

IV. THE PETITION IS DEFICIENT ON ITS FACE BECAUSE IT OFFERS NO EVIDENCE THAT WHOLESALE RATE REGULATION PROTECTS CONSUMERS.

Section 332(c)(3)(B) requires a petitioning state to (1) produce evidence of competitive conditions for provision of CMRS, (2) show that those conditions do not adequately protect subscribers from unjust or unreasonable rates, and (3) demonstrate that the regulatory scheme will provide that protection.

Nearly all of the Decision is devoted to an exhaustive analysis of the voluminous testimony on cellular wholesale competition in Connecticut. The Commission need not, however, wade into that factual morass. For the DPUC has not made the requisite factual showing. It has not attempted to supply evidence as to competitive conditions at the subscriber level, to show that those conditions leave consumers vulnerable to unjust or unreasonable rates, and to demonstrate why wholesale rate regulation is necessary to protect them. In other words, the DPUC has not, as it must, established either a need for regulation to protect consumers or a causal connection between its regulatory scheme and consumer protection. That nexus, however, is precisely what Congress required before a

state may depart from the general rule of preemption. For only when that nexus exists is there a basis for supplanting the benefits of unimpeded competition in the CMRS marketplace.

The Decision is devoid of any evidence that consumers are subject to unjust and unreasonable rates.[5] In fact, the record showed that there is vigorous competition for subscribers throughout all of Connecticut. All of the cellular markets are served by two fully operational cellular carriers with comparable market shares. The testimony showed that the consumer market in Connecticut is competitive. There was, in contrast, no evidence that consumers pay unreasonable or unjust rates.

In addition, the DPUC has not offered evidence, let alone proved, that its regulations are necessary to protect end users. The DPUC regulates only wholesale prices. It has no retail regulation. There are no tariff or other requirements imposed by the state which govern the prices that CMRS carriers are permitted to charge the public. Thus, even if retail market conditions were such that consumers might not be fully protected against unreasonable rates, the DPUC's existing regulatory scheme would not be capable of offering that protection. Conversely, the state scheme imposes blanket price regulation at a

---

[5] Section 20.13(a)(2) of the Commission's Rules sets forth the categories of information that "might be considered pertinent" to evaluating a Section 332 petition. The DPUC fails to provide responsive information on nearly all of these categories because it confined its investigation to wholesale market conditions. Thus, there is no evidence on subscriber rate information and trends, competitive practices in the retail market, or customer complaints.

wholesale level -- even though competitive conditions at a retail level may be entirely adequate to protect consumers.

In short, there is no logical or rational connection between wholesale rate regulation and protection of end users. There is no apparent reason -- and the DPUC offers none -- why wholesale rate controls protect the public. In fact the DPUC's maintenance of minimum wholesale prices below which cellular service cannot be sold would, if anything, appear to discourage price reductions to the detriment of consumers. Even were there some theoretical basis that wholesale rate regulation might have some benefits for subscribers, this would not establish that such regulation is "necessary" to protect subscribers, which the Commission must find in order to grant the Petition. Section 332(c)(3)(B).

The DPUC's wholesale rate regulation system thus cannot satisfy the tests of Section 332(c)(3). In that section Congress made it clear that the entire thrust of permitting states narrow authority to continue rate regulation was to deal with those unusual situations where competitive conditions did not protect consumers. It nowhere indicated any need or desire to allow states to intervene among CMRS carriers to protect resellers. The legislative history confirms that Congress intended to allow regulatory intervention in the marketplace only to protect consumers.[6] In contrast, the thrust of the DPUC's decision was whether

---

[6] H.R. Rep. No. 103-111 at 261 (state rate regulation may continue only where state can show "consumers are not protected from unreasonable and unjust rates; H. Conf. Rep. No. 103-213 at 493 (using terms "subscribers" and "consumers" interchangeably).

independent resellers needed regulatory protection. The goal of Section 332 is, however, to safeguard the public, not individual competitors.

Assuming that there might be a situation in which wholesale rate regulation might conceivably be shown to be necessary to protect consumers, the DPUC does not offer any evidence that such a situation exists in Connecticut. It nowhere attempts to demonstrate a nexus between its wholesale regulation and how that regulation is essential to guard end users. Again, therefore, the DPUC's petition is defective as a matter of law.

V. THE DPUC FAILS TO DEMONSTRATE THAT CMRS MARKET CONDITIONS ARE NOT COMPETITIVE.

For the above reasons, the Commission need not evaluate the massive evidence developed in the DPUC's proceeding on the state of wholesale competition in Connecticut. Even if competition at that level were shown, by some measure, to be insufficient, the prerequisites to sustaining rate regulation under Section 332 would not be met.

To the extent, however, that the Commission believes it should evaluate the DPUC's assessment of competition, Bell Atlantic has prepared a detailed rebuttal of the Decision, provided as Appendix A to this Opposition. The Decision groups evidence under the eight types of information which the Commission's Rules identify as potentially relevent. Section 20.13(a)(2). Appendix A reviews the DPUC's findings as to each type of information and demonstrates why they were incorrect or unsupported by the record. It also reports the extensive evidence in

the record -- not mentioned by the Decision -- which shows that the cellular wholesale market is competitive today and will be event more competitive in the near future.

There are, however, several overall aspects of the DPUC's analysis of competition which should be kept in mind in reviewing Appendix A, because they confirm that the only lawful course for the Commission is to deny the Petition.

A. The Evidence Showed Reasonable Rates of Return and Vigorous Cellular Competition.

Less than three years ago, the DPUC issued a decision finding that the Connecticut market for bulk wholesale cellular service had reached the point where, under state law, the DPUC could forbear from continued rate regulation.[7] The DPUC found that there was competition between the A-side and B-side carriers, that bulk wholesale service was provided in an equitable and non-discriminatory manner and that there were no abusive practices. Id. The DPUC commented favorably on the expansion of network service coverage and the development of cellular technology, and agreed that competition in the Connecticut market had flourished while overall costs for bulk cellular service had decreased. Id. Notwithstanding those favorable findings, however, the DPUC concluded that

---

[7] Application of Springwich Cellular Ltd. Partnership for a Declaratory Ruling Re: Forbearance From Regulation of Rates of Cellular Telephone Mobile Telephone Service, No. 90-08-03, Slip op. Sept. 25, 1991 ("1991 Decision").

"continuing rate regulation will provide cellular service competition with the opportunity needed to develop in the Connecticut market." Id.

Since the DPUC's 1991 decision, the Connecticut market for CMRS has become even more competitive. The evidence introduced during the 1994 proceeding showed declining prices, high rates of subscriber growth, expanding service coverage, introduction of numerous new services, and intense competition between Bell Atlantic and Springwich. (Appendix A at 6-7.) The carriers have changing but similar market shares, currently at 54% and 46%. (Id.) Since 1987, Springwich has lowered its effective wholesale rates five times. The Bell Atlantic systems have reduced their wholesale rates almost 50% since 1991. Bell Atlantic and Springwich have never increased their wholesale rates and are still charging well below tariff maximums. (Id. at 8-9.)

In its new Decision, the DPUC fails even to acknowledge its 1991 finding that competition permits deregulation of the bulk cellular market, or the fact that changes in that market since three years ago would serve to strengthen those conclusions. Both the 1991 and 1994 decisions show, in the end, that Connecticut simply wants to keep regulation in place until more competitors are present. That is not the standard Congress imposed. Both decisions in fact supply the evidence of competition in Connecticut that requires deregulation, now.

In addition to showing vigorous wholesale competition, the 1994 proceeding demonstrated that rates of return of both carriers are consistent with a competitive market. To determine the reasonableness of wholesale cellular rates,

the DPUC evaluated the rates of return of the two principal wholesale carriers, Bell Atlantic and Springwich. (Appendix A at 3-4.) After taking extensive testimony and receiving numerous exhibits, the DPUC was unable to find that rates of return for either carrier were unreasonable:

> The Department believes that the record of this proceeding is inconclusive relative to the cellular carriers rate of return and their financial performance since 1987. ... The need for further investigation is necessary. Accordingly, the Department will, at the conclusion of this proceeding, initiate a separate docket to review in greater detail each carriers' rate of return ... . While the Department does not intend to "rate of return" regulate the cellular carriers, the Department will use this information as a guide to establishing appropriate bulk wholesale cellular rates.

Decision at 11. At other places, the Decision sounds the same theme: given the inconclusive data presented, more investigation is necessary. See, e.g., Decision at 14 ("The Department is unable to make a finding that current bulk wholesale cellular rates are just and reasonable due to the uncertainty of what constitutes an acceptable ROR [rate of return]").

The Department's conclusion was wrong. The evidence showed that rates of return were in fact reasonable and consistent with a competitive market:

Dr. Jerry A. Hausman, presented as an expert witness, testified that both cellular carriers had consistently earned a rate of return on equity of less than 15%. He testified that, in his expert opinion, this demonstrated a fully competitive wholesale market. (Appendix A at 5.) In fact, rates of return were below what would have been expected given the level of competition and level of risk faced by existing cellular carriers. Dr. Hausman, in a statement provided to

the Commission as Appendix B to this Opposition, reviews the calculation of rates of return and the data presented to the DPUC. He concludes:

> These data demonstrate that neither cellular carrier is earning a rate of return above what would be expected in a competitive market with the amount of risk inherent in cellular markets. In fact, both the BAM and Springwich rates of return are below the rates of return that the FCC uses to regulate LECs, which have considerably less risk than cellular carriers. ... Analysis of rates of return of the two primary cellular carriers in Connecticut demonstrates conclusively that they are not earning above competitive rates of return. ... Thus, the Connecticut data do not demonstrate that cellular prices are too high in Connecticut.

Hausman Statement at ¶¶ 6, 13.

The resellers, who intervened in the DPUC proceeding to preserve regulation, offered expert testimony that a 15% rate of return on total capital was reasonable. Hausman Statement at ¶ 10, 12. Since this figure will by definition be less than the return on equity alone, this testimony indicated that returns on equity greater than 15% -- and well in excess of Bell Atlantic's and Springwich's returns -- were reasonable.

When actual rate of return calculations for Bell Atlantic and Springwich showed that returns on equity were below 15%, the resellers' expert scrambled to "adjust" the numbers. Dr. Hausman testified as to the lack of basis for those adjustments, and the record shows that these adjustments failed to conform to FCC methodology. (Appendix A at 4.)[8]

---

[8] For example, in "recalculating" Springwich's rate of return, the resellers' expert substituted Bell Atlantic's lower operating expenses for Springwich's actual operating expenses. As Dr. Hausman observes, "This substitution has no basis in economics (or regulatory accounting) and should be disregarded in any reasoned

In any event, to act on the Petition the Commission need go no farther than the DPUC's own admission that the evidence was "inconclusive." That admission is sufficient to find that Connecticut has not sustained its burden to produce evidence of unreasonable rates, let alone met its "burden of proof." Section 20.13(a)(1).

B. A Duopoly Cellular Market Is Not Sufficient Grounds to Retain Rate Regulation.

Time and again the Department expresses its opinion that a duopoly market structure is per se anticompetitive and thus justifies regulation. It states, for example:

> Rate regulation of the cellular carriers should continue until it can be satisfactorily demonstrated that wireless service providers are effectively in operation and that true competition is present in the CMRS marketplace. In order to facilitate the cellular carriers' demonstration that competition is present in Connecticut, the Department will, no later than July 1, 1996, open a proceeding to review the status of competition in the CMRS marketplace in the state. The Department has chosen July 1, 1996, because as projections in the record indicate, PCS and ESMR service providers should be operational in Connecticut and may be competing with the cellular carriers.

Decision at 18-19. (See Appendix A at 10-12.)

In other words, the DPUC bases continued regulation on the existence of a cellular duopoly. Only when that duopoly has been eroded by competing carriers will it consider eliminating regulation. The mere existence of a duopoly is not,

---

analysis." Hausman Statement at ¶ 11.

however, the correct test under Section 332. A state cannot preserve its scheme and avoid Congress' preference for deregulation merely because of dissatisfaction with the current market structure.[9]

Moreover, the Commission has for years fostered the duopoly structure, based on its findings that a duopoly would most effectively benefit subscribers by promoting competition and faster buildout of systems. While the DPUC may not agree, that is beside the point. There is nothing to distinguish Connecticut from any other state in this regard. In fact, Connecticut has vigorous cellular competition both at a wholesale and retail level in every cellular market, which is not the case in many states which have not filed Section 332 petitions. Congress was fully aware of the cellular industry's duopoly market structure when it enacted new Section 332.[10] Yet it preempted state rate regulation, except in narrow, specialized circumstances. Clearly Congress did not intend that the existence of a duopoly, without more, would justify state regulation. Were that the case, the preemption goals of the Budget Act would be undermined.

The DPUC's hostility to the FCC-approved cellular duopoly structure led it to rely on the Herfindahl-Hirschman Index ("HHI") for justifying continued

---

[9] The DPUC's approach is also unlawful because it places the burden on carriers to prove, to the DPUC's satisfaction, that the CMRS market is fully competitive. Section 332 and the Commission's Rules, however, place the burden on the DPUC to prove that the market is not competitive and that regulation is necessary.

[10] As one court has recognized, the existence of a duopoly structure does not establish that a market is non-competitive. Cellnet Communication, Inc. v. FCC, 965 F.2d 1106, 1112 (D.C. Cir. 1992).

regulation. HHI is, however, used to evaluate mergers, not to determine whether a market should be regulated. (Appendix A at 13.) In addition, using HHI here merely restates the obvious, that the wholesale cellular market is a duopoly, which does not prove that the market is non-competitive. (Id. at 13-14.) Dr. Hausman explains why the DPUC's HHI exercise was both irrelevant to a valid analysis of competition and why it was improperly conducted:

> The use of HHIs by the CDPUC is contrary to good economic analysis. Rather than doing a forward looking analysis to understand the likely competitive evolution of mobile telecommunications, the CDPUC used a backward looking analysis which ignores ongoing competitive events in Connecticut today and in the near future. ... All economists agree that the competitive analysis must be forward looking, and additional competition for cellular has begun to take place in Connecticut.

Hausman Statement at ¶¶ 7, 15. The hearing revealed that competition is increasing significantly with Nextel's ESMR networks; that company is developing its network in Connecticut and has approval for over 20 tower locations. See Hausman Statement at ¶ 16; Appendix A at 15-16. Dr. Hausman reviews these and other competitive developments and concludes:

> The CDPUC recognized that ESMR and PCS would soon begin operation, but it misunderstood the competitive impact of new entry. It attempted to recalculate HHI's taking into account projections of ESMR and PCS CMRS share in the future. However, it made a fundament economic mistake in failing to recognize that competition takes place at the margin. It is the competition for new customers (absent price discrimination) that sets prices in a market so that looking at overall market shares when new entry has occurred is incorrect... . Thus, the usefulness of an HHI is limited for CMRS because of the rapidly changing technology and new entry, but an appropriate HHI demonstrates that the new entrants from ESMR and PCS will have more than sufficient capacity to create sufficient competition so that regulation is unnecessary.

Hausman Statement at ¶¶ 19-20.

The language of Section 332(c)(3) is clear with regard to the grounds for state rate regulation. These grounds do not allow rate regulation by a state which, for example, believes it to be in the public interest to regulate rates, nor by a state which defines competition in a manner other than that established by the Act and decides that regulation should continue based on this unauthorized standard. This, however, is exactly what the DPUC unlawfully requests in its Petition.

C. The DPUC Requests to Keep Regulation in Place While it Develops More Information, Violating Section 332's Deadline.

In the end what Connecticut effectively asks is that it be permitted more time to meet Section 332's standards. It states that, given the uncertain and inconclusive evidence, further investigation is necessary. Until all of those investigations are completed, the DPUC says, and the duopoly structure no longer exists, it should retain wholesale rate authority.[11]

The DPUC's request turns Section 332 on its head. Congress established two distinct paths for states who wanted to regulate CMRS rates. They could

---

[11] The DPUC enumerates a lengthy list of subjects to be investigated, including proceedings to (1) "review in greater detail each carrier's rate of return" (Decision at 11); (2) "investigate the competitive practices of the cellular carriers" (Id. at 27); (3) "review the wholesale carrier and retail affiliate relationships of Springwich/SNET Cellular and BAMM" (Id.); and (4) "review the relationship between the cellular carriers' costs and their respective rates and charges" (Id. at 28).

preserve existing regulations if they demonstrated, in a petition filed by August 10, 1994, that the specific regulations were necessary to protect consumers. Section 332(c)(3)(B). Alternatively, they could petition in the future, if conditions warranted, to impose regulations. Section 332(c)(3)(A). The DPUC had one full year after enactment of the Budget Act to develop the evidence required for a petition, but did not do so. The DPUC wants to have its cake and eat it -- to postpone its proof of the need for wholesale rate regulation, but meantime to continue existing regulation in force. This it cannot do.

Permitting Connecticut to retain the burdens of existing regulation on cellular carriers, while it conducts various inquiries, would not only violate Section 332; it would also foster a situation where cellular carriers are increasingly harmed by the asymmetrical regulatory burdens. The record before the DPUC demonstrated that other wireless competitors are building competing systems. PCS carriers will soon be licensed. None of these carriers are subject to rate, or indeed to any other, DPUC regulation. (Appendix A at 15-16.) That violates Congress' and the Commission's cardinal objective of achieving regulatory symmetry among CMRS competitors.

In short, granting the Petition would effectively award the DPUC a reprieve from Section 332's deadline, and undermine even-handed competition among CMRS carriers in Connecticut.

D. The Carriers' Volume Discounts and Rounding Practices Have Repeatedly Been Approved by the DPUC.

Much of the Decision addresses the cellular carriers' practices of granting small volume discounts to resellers based on the quantity of lines purchased, and their procedures for rounding calls. Again, these practices have nothing to do with end user rates or whether end users need regulatory protection.

Moreover, the DPUC can hardly complain to the FCC about the supposed potential anti-competitive effect of volume discounts, because those discounts are contained in the carriers' tariffs which the DPUC has approved. In addition, the DPUC has repeatedly stated that the volume discounts set forth in the tariffs are cost-justified and non-discriminatory. (Appendix A at 23.) Bell Atlantic's effective wholesale price list as of July 15, 1994 that is appended to the Petition shows that the maximum volume discount available for both cellular number and usage charges is only 6.5 percent; resellers are able to qualify for (and in fact have) volume discounts, which are available on a non-discriminatory basis.[12]

The DPUC also complains about Springwich's practice of billing on a per-minute basis rather than in thirty second increments as Bell Atlantic does. Decision at 28. Again, the DPUC is attacking its own prior actions, for it has approved wholesale tariffs for Springwich which specifically authorize charging for

[12] The Commission has approved volume discounts as a legitimate pricing practice by common carriers. See e.g., Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984). Discounts must be available on a non-discriminatory basis to purchasers who meet the volume tests. This is true of both Bell Atlantic's and Springwich's discounts.

airtime in one minute increments as shown in the tariff pages appended to the Petition. Billing in one-minute increments is consistent with the practice of many other carriers and has been in effect since Springwich's first tariff became effective. (Appendix A at 24.) Moreover, Bell Altantic's and Springwich's different policies on rounding reflects their effort to compete by offering customers different choices. Putting aside the fact that this issue has nothing to do with whether end user rates are unjust, the inescapable fact is that the DPUC has itself approved those practices. They cannot, therefore, constitute a competitive abuse warranting rate regulation.

E. The Petition's Exhaustive Review of Relations Between Cellular Carriers and Resellers Is Inaccurate and Irrelevant to a Section 332 Petition.

Nearly all of the Petition and Decision are devoted to a detailed review of various relationships between the facilities-based carriers, Springwich and Bell Atlantic, their retail arms, and independent resellers.[13] The DPUC's analysis is irrelevant to the statutory test for continuing rate regulation, and in any event inaccurately characterizes the record.

For example, the Petition alleges that the DPUC identified areas of "anti-competitive and discriminatory practices" that result in an "atmosphere of anti-competitive behavior." Petition at 2. The alleged practices rest solely on the

---

[13] The DPUC does not point out that, of the nine independent cellular resellers in Connecticut, only three (two of which are affiliated) intervened before the agency to support continued regulation. (Appendix A at 3.)

wholesale cellular carriers' structural relationships with their retail affiliates. Id. Yet, other than to state the obvious that a close relationship exists between the carriers' wholesale and retail operations,[14] the DPUC fails to connect this fact to the need for its regulatory scheme, let alone to Section 332.

The Petition incorrectly states that the DPUC found that the carriers' retail affiliates sell services to end-users that are priced at less than wholesale prices to resellers. Petition at 3. None of these "facts" were found in the Decision itself. The Decision suggested that volume discounts might give affiliated resellers an "unfair advantage" but that further investigation would be required in order to determine whether that were true. See Decision, at 28, 32 & Finding of Fact 25 ("The disparity between the rates and charges the independent resellers currently experience for bulk wholesale cellular service when compared to that experienced by cellular carriers' retail affiliates require further review.").[15]

---

[14] The DPUC finds it "disturbing" that Springwich and its retail affiliate have offices in the same building. Petition at 2. It complains that the retail affiliate of BAM "is a division of the same company." Id. Since its regulatory scheme does not prohibit these relationships, it is hard to see how that scheme is, as Section 332 requires, necessary to protect subscribers. (Appendix A at 18.)

[15] The Petition is internally inconsistent because it asserts that retail rates are too high while claiming simultaneously that the carriers' affiliated resellers are pricing services below wholesale (i.e., retail rates are too low).

Indeed, the DPUC's regime, which places a floor on effective cellular wholesale prices, suggests that the DPUC's goal is to protect resellers, not end users. If the true goal were to encourage the lowest possible end user prices, a floor would make no sense.